These notes refer to the Armed Forces Act 2011 (c.18)
which received Royal Assent on 3 November 2011

ARMED FORCES ACT 2011

EXPLANATORY NOTES

COMMENTARY ON THE SCHEDULES

Schedule 3 – Minor amendments of service legislation

148. Section 22A of the Armed Forces Act 1991 permits a service policeman to remove to suitable accommodation a child who appears to be at risk. For this purpose "service policeman" is defined as having the same meaning as in the Armed Forces Act 1996. *Paragraph 1* of Schedule 3 redefines the expression as having the same meaning as in AFA 2006.

149. Section 67 of AFA 2006 confers powers of arrest for service offences. Subsection (2)(c) allows an officer to be arrested on the order of another officer, by a person who is lawfully exercising authority on behalf of a provost officer. *Paragraph 2* of the Schedule amends this provision so as to make it clear that an officer may be arrested *by* an officer exercising authority on behalf of a provost officer: there is no need for such an officer to order a third officer to carry out the arrest.

150. *Paragraph 3* extends section 90 of AFA 2006, which permits a service policeman to enter and search certain premises for the purpose of arresting a person, so as to apply where the person is unlawfully at large and is to be arrested under section 303 of the Act.

151. Part 3 of AFA 2006 deals with powers of arrest, search and entry. It replaced Part 2 of the Armed Forces Act 2001, in which "service living accommodation" was defined as including accommodation occupied either by service personnel or by civilians to whom service law applied. In AFA 2006, however, the expression was erroneously defined so as to include only the former. *Paragraph 4* of the Schedule corrects the error by including accommodation occupied by a civilian subject to service discipline, thus reverting to the position as it was before AFA 2006 came into force.

152. *Paragraph 5* is explained in paragraphs 160 and 161. Section 115 of AFA 2006 (duty of commanding officer with respect to investigation of service offences) establishes a general duty on commanding officers as to the investigation of possible offences by those under their command. In particular, if a commanding officer becomes aware of an allegation or circumstances which would indicate to a reasonable person that a service offence may have been committed by someone under his command, the commanding officer must ensure that the matter is investigated appropriately or ensure that a service police force is aware of the matter.

153. Additionally, under sections 113 (commanding officer to ensure service police aware of possibility serious offence committed) and 114 (commanding officer to ensure service police aware of certain circumstances) of AFA 2006, if a commanding officer becomes aware of an allegation or circumstances which would indicate to a reasonable person that an offence listed in Schedule 2 to AFA 2006 may have been committed by someone in his command or if he becomes aware of any circumstances prescribed by regulations made under section 128 of AFA 2006 (Regulations for purposes of Part 5), he must ensure that a service police force is aware of the matter.

154. The Director of Service Prosecution is tasked under AFA 2006 with the conduct of prosecutions before service courts.

155. Section 116 (referral of case following investigation by service or civilian police) of AFA 2006 applies where the service police have investigated a possible service offence or where a civilian police force has investigated a matter and referred it to the service police.

156. Section 116(2) provides that a service policeman must refer the case to the Director of Service Prosecutions (for a decision on whether to charge etc) if he considers that there is sufficient evidence to charge:

(a) an offence listed in Schedule 2;

(b) if he is aware of any prescribed circumstances, any service offence.

157. The duty to refer relates to the most serious cases (Schedule 2 offences) and to a number of other cases in which it is considered especially important to ensure that the key decisions on prosecution are decided by the Director (the "prescribed circumstances cases").

158. Under section 116(3), if the service policeman considers that there is sufficient evidence to charge a service offence but the case is not within section 116(2), he must refer the case to the suspect's commanding officer.

159. While it is for the service policeman to decide whether there is sufficient evidence to bring a case within section 116(2) or (3), section 116(4) provides for a duty on the service policeman to consult the Director.

160. *Paragraph 5* provides for the substitution of a new subsection (4) and the insertion of a new subsection (4A) into section 116 to clarify that the duty to consult the Director is not limited to when a duty has fallen on the commanding officer under section 113 or 114 (i.e. he has actually become aware of allegations or circumstances which gave rise to such a duty), but arises by reference to the type of allegation or circumstance investigated. Under the new subsection (4), the duty to consult arises if:

a) the allegation or circumstance would indicate to a reasonable person that a Schedule 2 offence has or might have been committed, or

b) any circumstances investigated are circumstances of a description prescribed by regulations under section 128 for the purposes of section 114,

and a service policeman proposes not to refer the case to the Director under subsection (2).

161. The new subsection (4A) provides that where subsection (4) requires a service policeman to consult, the service policeman must do so as soon as reasonably practicable and before any referral of the case under subsection (3).

162. *Paragraphs 6 and 9* make related amendments in respect of the powers of the Director of Service Prosecutions to change the charges against an accused who has elected Court Martial trial. At present these powers are restricted by rule 157 of the Armed Forces (Court Martial) Rules 2009 (S.I. 2009/2041). Rule 157 requires the accused's consent before the Director can add any charge, or substitute a charge which could not be heard summarily or which the accused's commanding officer could not have heard summarily because section 54 of the Act would have required the permission of higher authority. Rule 157 is in Part 20 of the Rules, the remainder of which is concerned with the powers of the Court Martial and is replaced by the new Schedule 3A (see the note on Schedule 1 above). Consistently with the policy of incorporating the whole of Part 20 into the Act, paragraph 6 of Schedule 3 repeals the provisions of section 125 which permit the restrictions to be imposed by court rules, and paragraph 9 inserts a new section 130A which replaces rule 157. However, the new restrictions are slightly different from those

currently imposed by rule 157. The accused's consent is still required before a charge can be added, or a charge which could not be heard summarily is substituted; but the substitution of a charge within section 54(2) of the Act (namely a charge of an offence listed in Part 2 of Schedule 1 to the Act, or of an attempt to commit such an offence) will require the accused's consent unless the original charge was also such a charge. It is irrelevant whether section 54 would in fact have precluded the commanding officer from hearing the new charge.

163. Section 129 of AFA 2006 requires a commanding officer, before hearing a charge summarily, to give the accused the opportunity of electing Court Martial trial. If the accused chooses not to elect, the summary hearing will normally begin immediately. The commanding officer may, in the course of the hearing, amend the charge, substitute another charge or bring an additional charge. In these circumstances, section 129(4) provides that the right to elect Court Martial trial must be re-offered. However, section 129(4) applies only if the charge is changed *after* the start of the hearing. If there is a delay between the offer of the right to elect and the start of the hearing, it appears that the commanding officer may change the charge *before* starting the hearing; and the legislation does not expressly require that the right to elect be re-offered before the hearing begins. *Paragraph 7* of the Schedule amends section 129 so as to make it clear that the right to elect must be re-offered if the charge is changed at any time after the first offer, whether before or after the start of the hearing.

164. The commanding officer's powers of punishment will depend on whether the commanding officer has extended powers. If the accused is subject to a suspended sentence of detention, the commanding officer's power to activate that sentence may similarly depend on whether the commanding officer has extended powers for that purpose. AFA 2006 provides that the commanding officer has extended powers if, before the summary hearing, an application for such powers has been made to higher authority and granted. If there is a delay between the offer of the right to elect and the start of the hearing, on a literal reading it would seem that the commanding officer can obtain extended powers during that interval without re-offering the right to elect. The amendment of section 129 made by paragraph 7 of the Schedule makes it clear that, if extended powers are obtained after the right to elect has been offered, that right must be re-offered.

165. Section 130(3) of AFA 2006 ensures that the right to elect is not re-offered where the accused first elects but then consents to the charge being referred back to the commanding officer. This does not apply if the charge is amended by the commanding officer after being referred back. But, read literally, it does apply if the commanding officer adds another charge, or substitutes a new charge for the one referred back. Similarly, a literal reading would suggest that the commanding officer can obtain extended powers after the charge is referred back, even though section 130(3) does not allow the re-offer of the right to elect. *Paragraph 8* of the Schedule amends section 130(3) so as to make it clear that the right to elect must also be re-offered if, after the charge is referred back, the commanding officer adds or substitutes another charge or obtains extended powers.

166. AFA 2006 provides that the commanding officer has extended powers only if such powers have been granted *before* the summary hearing. It follows that extended powers cannot be obtained where the charge is changed in the course of the hearing (even though section 129(4) already requires that the right to elect be re-offered if the charge is changed).*Paragraphs 10, 11, 15 and 16* of the Schedule amend the relevant provisions so that, where the charge is changed in the course of the hearing, extended powers can then be obtained before re-offering the right to elect under section 129(4) and proceeding with the hearing.

167. *Paragraph 12* removes the requirement for a commanding officer to have extended powers of punishment in order to award a fine of more than 14 days' pay to an officer or warrant officer. The possession of extended powers is a procedural requirement that

must be satisfied before certain punishments can be awarded summarily. The maximum fine that a commanding officer can award to a person of any rank remains 28 days' pay.

168. *Paragraph 13* amends section 153 of AFA 2006 so as to enable the summary hearing rules made under that section to make provision as to grants of extended powers and of permission to hear a charge which under section 54 may not be heard summarily without permission. For example, the rules could provide that in specified circumstances a grant of extended powers, or of permission to hear a charge, ceases to have effect.

169. *Paragraphs 14*, *17 and 19* amend provisions of AFA 2006 which refer to an offence "in the British Islands" so as to make it clear that they include conduct which is an offence *under the law of* any part of the British Islands even if it occurs outside that part.

170. Section 213 of AFA 2006 provides that certain provisions of the Powers of Criminal Courts (Sentencing) Act 2000 apply to a detention and training order made by a service court as well as one made by a civil court. The provisions thus applied do not include section 106 of the 2000 Act. Subsections (4) and (5) of that section provide for the case where an offender is subject both to a detention and training order and to a sentence of detention in a young offender institution; subsection (6) provides for the effect of a detention and training order made in the case of a person aged 18 or over (by virtue of a provision enabling a court to deal with the person in a way in which a court could have dealt with the person on a previous occasion). *Paragraph 18* of the Schedule amends section 213 of AFA 2006 so that these provisions of the 2000 Act apply equally to a detention and training order made under section 211 of AFA 2006.

171. Section 270 of AFA 2006 prohibits a service court from awarding a "community punishment" (a service community order or an overseas community order) unless the offence is serious enough to warrant it. This corresponds broadly to section 148 of the Criminal Justice Act 2003, which imposes a similar restriction on "community sentences" passed by civil courts in England and Wales. Section 151 of the 2003 Act makes an exception to this principle for an offender who has been fined on three or more previous occasions: in this case a civil court may pass a community sentence even if the latest offence is not itself serious enough to warrant such a sentence. Section 270(7) of AFA 2006, as enacted, applies section 151 of the 2003 Act (with modifications) to a court dealing with an offender for a service offence. However, the Criminal Justice and Immigration Act 2008 amends section 151 of the 2003 Act so as to provide separately for community orders and youth rehabilitation orders (the new form of community sentence for offenders aged under 18). A new section 150A is inserted into the 2003 Act, prohibiting a court from making a community order (but not a youth rehabilitation order) unless the offence is punishable with imprisonment or section 151 so permits. In order to keep the powers of service courts in relation to community punishments aligned with those of civil courts in relation to community sentences, the 2008 Act inserted new sections 270A and 270B into AFA 2006 (corresponding respectively to the new section 150A of the 2003 Act and section 151 of that Act as amended), and repealed section 270(7). This overlooked the fact that community punishments under AFA 2006, unlike community orders under the 2003 Act as amended, include orders made against persons aged under 18 (which, under AFA 2006, would necessarily be overseas community orders). A service court would thus be prohibited from making an overseas community order against a young offender in circumstances in which a civil court would be able to make a youth rehabilitation order. The provisions of the 2008 Act inserting the new sections 270A and 270B into AFA 2006 were therefore not brought into force. But section 270(7) cannot be left as it stands because it no longer works in conjunction with section 151 of the 2003 Act as amended. *Paragraph 20* of the Schedule therefore amends section 270 of AFA 2006 so that, instead of being subject to section 151 of the 2003 Act as modified, it is subject to a new section 270A. The new section will enable a service court to award a community punishment, even if the latest offence is not serious enough to warrant it, where the offender has been fined on three or more previous occasions for offences committed since the offender reached the age of 16. The uncommenced amendments made by the 2008 Act are repealed.

172. Section 301 of AFA 2006 provides, in effect, that any period during which a person sentenced to service detention is unlawfully at large does not count towards the period of detention. The definition of a period when such a person is unlawfully at large assumes that that period will necessarily begin at a time after the sentence is passed - which is not the case if the sentence is passed in the offender's absence. *Paragraph 21* of the Schedule amends section 301 so as to make it clear that in these circumstances the person is unlawfully at large until taken into custody.

173. In the past the Provost Marshal of the Royal Air Force Police and some of the senior officers appointed to carry out police functions within that force were not members of the force. Section 375(5) of AFA 2006 provides for Provost Marshal and such officers to be treated for the purpose of the Act as members of the service police force within which they worked. Such appointments are no longer made. *Paragraph 22* accordingly provides for the repeal of section 375(5).

174. Section 380 of AFA 2006 made provision for the Secretary of State to make transitional provision by order in connection with the coming into force of that Act. It may be necessary to make changes to provisions of an order made under section 380 by way of transitional provisions for the Act. *Paragraph 23* amends section 380 so that the power to amend an order under section 380 includes amendments in connection with the coming into force of the Act as well as amendments in connection with the coming into force of AFA 2006.

175. Schedule 12 to the Criminal Justice Act 2003 permits a civil court to activate a suspended sentence of imprisonment where the offender is convicted of another offence committed during the operational period of the suspended sentence. Schedule 7 to AFA 2006 applies that Schedule with modifications so that, in similar circumstances, a suspended sentence of imprisonment passed by a service court can be activated by the Court Martial. But this applies only if the offender is *convicted* of another offence. AFA 2006 does not refer to a person as being "convicted" where a charge is found proved at a summary hearing. Section 376 provides that references to conviction in that Act include such a finding, but does not expressly apply to references in the 2003 Act as applied by AFA 2006. It may therefore be arguable that the Court Martial cannot activate a suspended sentence of imprisonment on the basis of a further offence if that offence was found proved at a summary hearing. *Paragraph 24* of the Schedule amends Schedule 7 to AFA 2006 so as to make it clear that the Court Martial can do so.